Filed 8/12/19 Gumpal v. Queen of the Valley Medical Center CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MAURO GUMPAL, Plaintiff and Appellant, v. QUEEN OF THE VALLEY MEDICAL CENTER et al., Defendants and Respondents.	A155417 (Napa County Super. Ct. No. 17CV001391)

Plaintiff Mauro Gumpal appeals from judgments entered after the trial court sustained defendants' demurrers without leave to amend. Gumpal contends that the trial court erred in concluding his action is barred by the statute of limitations for medical negligence, Code of Civil Procedure section 340.5.[1] He also contends that his action is timely under section 352.1's two-year tolling provision for incarcerated complainants. We affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Gumpal filed this action on December 7, 2017 against Queen of the Valley Medical Center ("QVMC"), St. Joseph Health System, Ali S. Vaziri, M.D., Jennifer Gunnell, M.D., and others.[2] He alleges that he was an incarcerated inmate between 2008

[1] All statutory references are to the Code of Civil Procedure.

[2] Defendants Brad J. Feliz, M.D., Michael C. Merwin, M.D., Walter Mickens, and Jack Cox, M.D. are not parties to this appeal

and 2010. At the end of July 2009, Vaziri worked with QVMC to test Gumpal's blood for hepatitis A, B, C, HIV, and helicobacter pylori. The results were negative. On August 13, 2009, October 22, 2009, November 9, 2009, and August 12, 2010, QVMC, Vaziri and Gunnell performed a series of rectal colonoscopies and upper endoscopies on Gumpal. QVMC and Vaziri also gave Gumpal a blood transfusion between 2009 and 2010.

Beginning on September 23, 2010, Gumpal began to suffer pain and distress from the symptoms of hepatitis A, B, and helicobacter pylori. Gumpal's blood tested positive for these diseases on February 11 and March 6, 2014. In August of 2015 defendants discovered the endoscopic machine they had used on Gumpal in all four of his procedures had not been properly sanitized in accordance with the manufacturer's directions. On March 14, 2016, Gumpal received a letter from the defendants indicating that he might have contracted a blood infection from his past medical procedures. On April 25, 2016, Gumpal had a nervous breakdown and began suffering from paranoia regarding his blood infections.

Gumpal alleges a cause of action against defendants for medical negligence in failing to clean and sanitize the surgical tools properly. On April 25, May 25, and June 27, 2018 respectively, QVMC, Vaziri and Merwin, and Gunnell filed separate demurrers, arguing that Gumpal's claim was barred by the statute of limitations for professional negligence by a healthcare provider. The trial court sustained the demurrers without leave to amend. It entered separate judgments in favor of Vaziri and Merwin on August 22, QVMC on August 24, and Gunnell on August 29, 2018.

DISCUSSION

I. Preliminary Procedural Issues

Gumpal's notices of appeal each state that they are from a judgment of dismissal after an order sustaining a demurrer; however, they refer to and attach the orders sustaining defendants' demurrers without leave to amend, rather than the ensuing judgments. Although those orders are not appealable, we will deem the notices of appeal

to be from the ensuing judgments. (*Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 202-203.)

Additionally, QVMC contends Gumpal waived the issues identified in the opening brief by failing to include the judgment in favor of QVMC or the notice of appeal of that judgment in the record on appeal. (See Cal. Rules of Court, rule 8.122(b)(1)(A) & (B) [clerk's transcript must contain notice of appeal, judgment appealed from and notice of its entry].) However, we have before us the notice of appeal as to QVMC and the order sustaining QVMC's demurrer without leave to amend, and the register of actions indicates judgment was entered in favor of QVMC on August 24, 2018. We will therefore consider the issues Gumpal raises against QVMC on the merits.

Similarly, Gunnell argues the appeal should be dismissed as to her because Gumpal did not file a notice of appeal of the judgment in her favor. But Gumpal subsequently filed a motion to augment the record to include, inter alia, a file-endorsed copy of his notice of appeal of the order sustaining Gunnell's demurrer. Gunnell does not oppose the request to augment the record with this document. By separate order, we grant the motion as to the notice of appeal, and we will also consider on the merits Gumpal's appeal against Gunnell.

II. The Merits

"We review an order sustaining a demurrer de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law." (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 221 (*Alexander*).) We assume the truth of all facts pleaded in the complaint, as well as those that may be reasonably inferred from it, and we also consider facts of which the trial court properly took judicial notice. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877; *Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc.* (2018) 29 Cal.App.5th 230, 233-234.)

The statute of limitations for medical malpractice actions is governed by section 340.5, which provides, in relevant part, "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the

commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, *whichever occurs first*. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person." (Emphasis added.)

Thus a medical malpractice action must be brought within three years of the date of injury, or one year after the date when the plaintiff discovers both the injury and its negligent cause, whichever occurs first. (*Drexler v. Peterson* (2016) 4 Cal.App.5th 1181, 1189-1190.) The date of injury refers to " 'the damaging effect of the alleged wrongful act and not to the act itself.' " (*Id.* at p. 1190, citing *Larcher v. Wanless* (1976) 18 Cal.3d 646, 656, fn. 11.) "The injury . . . is not necessarily the ultimate harm suffered, but instead occurs at 'the point at which "appreciable harm" [is] first manifested.' " (*Drexler*, at pp. 1190–1191, citing *Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437, fn. 8.)

Gumpal argues his injury occurred in March 2016, when he received the letter informing him he might have been infected by the equipment. We disagree. The allegations of the complaint show that Gumpal's injury—that is, "appreciable harm"—occurred on September 23, 2010, when Gumpal "began continually and constantly suffering pain and distress." In his reply brief, Gumpal argues that he did not suffer appreciable harm until April 25, 2016, when he alleges he suffered a nervous breakdown and began feeling paranoid about his blood infections. But, as we have explained, the allegations of the complaint show appreciable harm was first manifested on September 23, 2010. That is the date on which the limitations period began to run. Gumpal filed this action seven years later, well outside either the one-year or three-year period.

Gumpal argues that the tolling provision of section 352.1 extends the limitations period for an additional two years. Section 352.1 provides, "If a person entitled to bring an action . . . is, at the time the cause of action accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the

time of that disability is not a part of the time limited for the commencement of the action, not to exceed two years."

Section 352.1 does not save this action. The Supreme Court of California has held that section 352.1's two-year tolling provision only acts to extend the one-year date-of-discovery statute of limitations, not the three-year date-of-injury statute of limitations. (*Belton v. Bowers Ambulance Service* (1999) 20 Cal.4th 928, 931 ["No tolling provision outside of MICRA [(Medical Injury Compensation Reform Act Micra of 1975) Stats. 1975, 2d Ex. Sess. 1975–1976, ch. 1, § 26.6, pp. 3949–4007] can extend the three-year maximum time period that section 340.5 establishes."].) The three year limitations period expired in 2013, well before Gumpal's action was filed.

Gumpal argues for the first time in his reply brief that the statute of limitations should be extended because defendants intentionally concealed their malpractice. (See § 340.5.) Normally, the court will not consider matters that are raised for the first time in a reply brief. (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 295-296.) In any case, this argument fails on the merits. "If 'a demurrer is sustained without leave to amend, [we] must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, [we] will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. [Citation.] The plaintiff bears the burden of establishing that it could have amended the complaint to cure the defect.' " (*Alexander, supra,* 23 Cal.App.5th at p. 221, citing *Berg and Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1035.)

In Gumpal's complaint, he alleges that defendants discovered the endoscopic machine had not been properly sterilized in August of 2015, after the limitations period had run. There is no basis to conclude that Gumpal could now amend the complaint to allege truthfully that the defendants discovered the problem within the limitations period. It was not an abuse of discretion for the trial court to deny leave to amend.

We recognize that applying the statute of limitations in this case yields a harsh result—in that Gumpal's action was barred before he would reasonably have thought to sue medical professions for having caused his illness. But the legislature has chosen how

to balance a patient's interest in compensation with a medical provider's interest in repose, and we are not at liberty to strike a different balance.

DISPOSITION

The judgments in favor of QVMC, Vaziri and Merwin, and Gunnell are affirmed. The parties shall bear their own costs on appeal in the interest of justice.

_____
TUCHER, J.

WE CONCUR:

_____
POLLAK, P. J.

_____
BROWN, J.